CRIMINAL YEAR SEMINAR

April 15, 2016 - Tucson, Arizona
May 6, 2016 - Phoenix, Arizona
May 13, 2016 - Chandler, Arizona

EVIDENCE/ DUI/ AMMA UPDATES

Presented By:

The Honorable Crane McClennen

Maricopa County Superior Court
Phoenix, Arizona

&

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EVIDENCE 2016

By
Judge Crane McClennen

Rule 103(a) — Preserving a Claim of Error. *(Pages 1 and 13.)*

103.a.095 A trial court should not preclude an expert's testimony without allowing the party to make an offer of proof.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶ 24 (2015) (defendant filed memorandum describing expert's testimony; when trial court disallowed that testimony, defendant asked to supplement offer of proof, but trial court denied request; court stated that supplemental offer would have aided its evaluation of trial court's decision, but was able to resolve issue on record presented).

PRESERVING A CLAIM OF ERROR

Defense counsel will cease placing air quotes around his references to the "justice" system.

Rule 103(d) — Preventing the Jury from Hearing Inadmissible Evidence. *(Page 1.)*

103.d.020 Although Arizona law does not explicitly prohibit speaking objections, Rule 103(d) provides that, to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jurors by any means.

State v. Lynch, 238 Ariz. 84, 357 P.3d 119, ¶¶ 16–17 (2015) (defendant did not identify, and court did not find, any inadmissible evidence state incorporated into its speaking objections; further, defendant did not object at trial and failed to demonstrate fundamental error).

Rule 103(d) — Preventing the Jury from Hearing Inadmissible Evidence. *(Page 1.)*

103.a.060 Objection of "no foundation" is insufficient to preserve the issue; the objecting party must indicate how the foundation is lacking so that the party offering the evidence can overcome the shortcoming, if possible.

State v. Rodriguez, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996).

State v. Guerrero, 173 Ariz. 169, 171, 840 P.2d 1034, 1036 (Ct. App. 1992).

Packard v. Reidhead, 22 Ariz. App. 420, 423, 528 P.2d 171, 174 (1974).

PREVENTING THE JURY FROM HEARING INADMISSIBLE EVIDENCE

Rule 106 — Remainder of or Related Writings or Recorded Statements. *(Page 2.)*

106.005 A video is a statement for purposes of Rule 106.

State v. Steinle (Moran), 237 Ariz. 531, 354 P.3d 408, ¶¶ 7–13 (Ct. App. 2015), *rev. granted*, CV–15–0263–PR (Feb. 9, 2016).

***STATE V. BURNS*, 237 Ariz. 1, 344 P.3d 303 (2015).**

***STATE V. BURNS*, 237 Ariz. 1, 344 P.3d 303 (2015).**

Rule 106 — Remainder of or Related Writings or Recorded Statements. *(Page 2.)*

Burns at ¶ 71 (defendant contended trial court should have admitted his statements to police that he had consensual sex with victim; because state did not introduce any writings or recorded statements about defendant and victim having non-consensual sex, defendant's statements were not necessary to qualify, explain, or place in context portion of statement already admitted).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 401 — Test for Relevant Evidence. *(Page 4.)*

401.cr.010 For evidence to be relevant: (1) the fact to which the evidence relates must be of consequence to the determination of the action (materiality); and (2) the evidence must make the fact more or less probable (relevance).

Burns at ¶¶ 46–47 (2015) (victim had GHB (date-rape drug) in liver; because when talking on telephone to sister, victim sounded confused and disoriented (which are side effects of ingested GHB), evidence was relevant.

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 401 — Test for Relevant Evidence. *(Pages 4 & 8)*

Burns at ¶¶ 49–51 (2015) (defendant's former fiancée testified on direct about her feelings of fear toward defendant; after defendant attempted on cross-examination to establish former fiancée had recently fabricated that testimony, her testimony on rebuttal that defendant threatened to kill her and that she planned to remove all guns from house was admissible to rebut claim of recent fabrication and was thus relevant).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 401 — Test for Relevant Evidence. *(Page 4.)*

Burns at ¶¶ 54–55 (2015) (evidence of 16 telephone calls between defendant and fiancée wherein he asked about search for victim's body, whether his brother had cleaned out his (defendant's) vehicle, and whether fiancée would stay with him "no matter what" (by time of trial, fiancée was then former fiancée) relevant to show defendant was involved in victim's disappearance).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 401 — Test for Relevant Evidence. *(Pages 5 & 8.)*

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue, and once trial court determines the photograph has probative value, trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

Burns at ¶¶ 59–62 (2015) (photograph of victim found in desert 3 weeks after murder in advanced state of decomposition with head severed by wild animals relevant and thus admissible because (1) photograph in any murder case is relevant to assist jurors in understanding issue because fact and cause of death are always relevant in murder prosecution, and (2) in this case, photographs showed where body was found and how it was hidden, and helped jurors understand expert testimony).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 401 — Test for Relevant Evidence. (Impeachment Cases) *(Page 5.)*

401.imp.010 Evidence that tests, sustains, or impeaches a witness's credibility or character is admissible for impeachment or rehabilitation purposes.

Burns at ¶¶ 101–04 (2015) (defendant's expert testified defendant could be safely managed in Arizona prison system; trial court properly allowed state to question witness about crimes and escapes from private prisons and Arizona State Prison).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition.

§ 13–1421. Evidence relating to victim's chastity; pretrial hearing. *(Page 8.)*

Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. *(Pages 5 and 6.)*

412.040 Evidence of specific instances of the victim's prior sexual conduct is generally not admissible, and is only admissible if the trial court finds the evidence is relevant to a specific fact in issue in the case.

403.cr.005 In order to raise on appeal a claim that the evidence should have been excluded under Rule 403, the party must make a specific objection stating Rule 403 as the grounds for the objection; a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition.

§ 13–1421. Evidence relating to victim's chastity; pretrial hearing. *(Page 8.)*

Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. *(Pages 5 and 6.)*

Burns at ¶¶ 43–45 (2015) (victim and defendant met at gas station and went out on date; almost 3 weeks later, victim was found dead, and state charged defendant with kidnapping, sexual assault, and murder; in opening statement and closing argument, prosecutor stated this was victim's "first date"; court held relationship between use of term "first date" in this case and sexual conduct was not so close that it fell within ambit of this statute; defendant contended on appeal evidence that victim had not dated previously warranted a mistrial under Rule 403; because defendant failed to object on that ground at trial, court reviewed for fundamental error only; court held fact that victim's date with defendant was victim's first date helped place victim's actions in context and thus was probative, and held defendant failed to show evidence posed danger of unfair prejudice, thus court found no error, much less fundamental error).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 404(b) — Other crimes, wrongs, or acts. *(Page 7.)*

404.b.cr.100 If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

Burns at ¶¶ 34–39 (2015) (state charged defendant with kidnapping, sexual assault, murder, and misconduct with weapons; because state had to prove defendant's prior felony convictions in order to prove misconduct with weapons, and because jurors would not have heard evidence of defendant's prior felony convictions if kidnapping, sexual assault, and murder charges had been tried separately, evidence of defendant's prior felony convictions was essentially impermissible character evidence, thus trial court abused discretion in not severing charges; court found error harmless, but took opportunity to advise that weapons misconduct charges should not be joined with other charges unless there is a factual nexus).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 611(b) — Mode and Order of Examining Witnesses and Presenting Evidence — Scope of cross-examination. *(Page 12.)*

611.b.090 The trial court has the discretion to permit recross-examination on any new issue raised on redirect.

Burns at ¶ 53 (2015) (defendant contended he should have been allowed to recross-examine his former fiancée about telephone conversation wherein she told defendant's co-worker she was not afraid of defendant and defendant was never violent with women; because defendant's attorney asked about this conversation on cross-examination and no new issue arose during redirect examination that would warrant recross-examination, trial court did not abuse discretion in not permitting recross-examination).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 702 — Testimony by Expert Witnesses.
(Pages 13, 14–15.)

702.005 Because the current version of Rule 702 is not a new constitutional rule, it does not apply to trials that ended before the new rule became effective on January 1, 2012, thus *Daubert* and new Rule 702 does not apply to trial that ended before that date.

Burns at ¶¶ 63–65 (2015) (defendant contended trial court should have held *Daubert* hearing; because trial concluded December 16, 2010, *Daubert* and new Rule 702 did not apply to defendant's trial; defendant contended trial court should have precluded testimony of state's ballistics expert under *Frye*; because testimony did not rely on any novel theory or process, it was not subject to *Frye*).

STATE V. BURNS, 237 Ariz. 1, 344 P.3d 303 (2015).

Rule 807 — Residual Exception. *(Page 19.)*

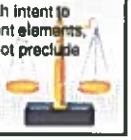
807.050 Self-serving statements, such as claims of innocence, lack circumstantial guarantees of trustworthiness.

Burns at ¶¶ 66–70 (2015) (defendant's statements to police that he had consensual sex with victim did not have circumstantial guarantees of trustworthiness: (1) statements were not spontaneous, but were made in response to police questioning 2 days after victim disappeared; and (2) defendant was not motivated to speak truthfully, being in police station interview room and speaking about a murder investigation).

Rule 301 — Presumptions (Legislation). (Page 3.)

360.085 When the legislature chooses different language within a statutory scheme, it is presumed those distinctions are meaningful and evidence an intent to give different meaning and consequence to the alternative language.

State v. Harm, 236 Ariz. 402, 340 P.3d 1110, ¶¶ 15–20 (Ct. App. 2015) (jurors: (1) defendant guilty of threatening or intimidating; and (2) not guilty of assisting criminal street gang by committing felony offense; in the aggravation phase, state proved defendant committed threatening or intimidating with intent to promote or further assist any criminal conduct by criminal street gang; **court held:** because crime of assisting criminal street gang under A.R.S. § 13-2321(B) and enhancement of sentence under A.R.S. § 13-714 for offense committed with intent to promote, further, or assist criminal street gang have different elements, defendant's acquittal of assisting criminal street gang did not preclude enhancement of sentence).



***STATE V. CARLSON*, 237 Ariz. 381, 351 P.3d 1079 (2015).**

***STATE V. CARLSON*, 237 Ariz. 381, 351 P.3d 1079 (2015).**

Rule 401 — Test for Relevant Evidence. *(Pages 4–5.)*

401.cr.060 The Sixth Amendment right to present evidence does not give a defendant the right to present a theory of defense in whatever manner and with whatever evidence the defendant's chooses, thus the exclusion of irrelevant evidence does not deny a defendant the Sixth Amendment right to present evidence.

Carlson at ¶¶ 36–37 (2015) (trial court precluded defendant's expert from testifying about risk factors that would tend to make defendant confess falsely; because defendant never suggested his confession was caused by any mental disorder, personality disorder, or similar affliction, and because defendant's expert did not diagnose or treat defendant and thus had no knowledge whether defendant had such disorders or conditions, trial court did not abuse discretion in precluding that testimony).

***STATE V. CARLSON*, 237 Ariz. 381, 351 P.3d 1079 (2015).**

Rule 702 — Testimony by Expert Witnesses. *(Page 13.)*

702.001 Trial courts should serve as gatekeepers in assuring that proposed expert testimony is relevant and reliable and thus helpful to the jury's determination of facts at issue, but should not supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony.

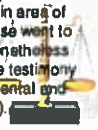
Carlson at ¶¶ 22–29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) defendant's statements were inadmissible hearsay, (2) defendant never established that experts would have relied on such statements in forming opinion, and (3) allowing that testimony would have cloaked statements with implication that expert relied on them while shielding defendant from rigors of cross-examination, trial court did not abuse discretion in precluding that testimony).

STATE V. CARLSON, 237 Ariz. 381, 351 P.3d 1079 (2015).

Rule 702 — Testimony by Expert Witnesses. *(Page 13.)*

702.030 To qualify as an expert, a witness need not have the highest possible qualifications or highest degree of skill or knowledge, and the trial court should construe liberally whether the witness is qualified as an expert; all the witness need have is a skill or knowledge superior to that of persons in general, and the level of skill or knowledge affects the weight of the testimony and not its admissibility.

Carlson at ¶¶ 30–31 (2015) (trial court precluded expert from testifying about risk factors that would tend to make defendant confess falsely when he spoke to media because expert's expertise was in general area of false confession and had no expertise or experience in area of false confessions to media; court held lack of specific expertise went to weight of the testimony and not its admissibility; trial court nonetheless did not abuse discretion in precluding that testimony because testimony went to defendant's general propensity to lie rather than to mental and physical circumstances affecting voluntariness of confession).



STATE V. CARLSON, 237 Ariz. 381, 351 P.3d 1079 (2015).

Rule 702 — Testimony by Expert Witnesses. *(Page 14.)*

702.a.040 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

Carlson at ¶ 29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) defendant's statements were inadmissible hearsay, (2) defendant never established that experts would have relied on such statements in forming opinion, (3) allowing that testimony would have cloaked statements with implication that expert relied on them while shielding defendant from rigors of cross-examination, and (4) expert in effect would have been giving opinion about defendant's truthfulness, trial court did not abuse discretion in precluding that testimony).

STATE V. CARLSON, 237 Ariz. 381, 351 P.3d 1079 (2015).

Rule 702 — Testimony by Expert Witnesses. *(Page 14.)*

702.a.045 Arizona has not addressed directly admissibility of testimony about a defendant's propensity to lie, but federal courts have not allowed such testimony unless it related to some mental or personality disorder that would cause the defendant to lie.

Carlson at ¶¶ 32–35 (2015) (trial court precluded defendant's expert from testifying about risk factors that would tend to make defendant confess falsely; because defendant never suggested his confession was caused by any mental disorder, personality disorder, or similar affliction, and because defendant's expert did not diagnose or treat defendant and thus had no knowledge whether defendant had such disorders or conditions, trial court did not abuse discretion in precluding that testimony).

***STATE V. CARLSON*, 237 Ariz. 381, 351 P.3d 1079 (2015).**

Rule 703 — Bases of an Expert's Opinion Testimony. *(Page 15.)*

703.080 An expert witness may disclose the facts or data if the party offering the evidence establishes that experts in a particular field would reasonably rely on certain kinds of facts or data in forming an opinion on the subject.

Carlson at ¶ 28 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because defendant never established experts in field of false confessions would reasonably rely on defendant's own statement that confession was false, trial court did not abuse discretion in precluding that testimony).

***STATE V. CARLSON*, 237 Ariz. 381, 351 P.3d 1079 (2015).**

Rule 703 — Bases of an Expert's Opinion Testimony. *(Page 16.)*

703.115 This rule does not authorize admitting hearsay on the pretense that it is the basis for the expert's opinion when the expert adds nothing to the out-of-court statement other than transmitting it to the jurors.

Carlson at ¶¶ 22–29 (2015) (trial court precluded expert from testifying that defendant told him he falsely confessed and defendant's explanation why he did so; because (1) expert would not have provided any additional insight or information about those statements and (2) defendant could not have testified about those statements without submitting to cross-examination, trial court did not abuse discretion in precluding that testimony).

Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. *(Pages 5–6.)*

403.cr.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v. Comman, 237 Ariz. 350, 351 P.3d 357, ¶¶ 23–25 (Ct. App. 2015) (defendant contended prosecutor's PowerPoint presentation was unfairly prejudicial because it contained pictures of large quantities of methamphetamine, while defendant's case only involved 1.3 grams; because state made clear to jurors that pictures were not from this case and were used for illustration only, trial court did not abuse discretion in allowing PowerPoint).

Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. *(Page 6.)*

403.cr.020 If evidence is relevant and thus admissible, a trial court may exclude that evidence if the opposing party establishes the evidence poses the danger of *unfair* prejudice, and establishes the *unfair* prejudice *substantially* outweighs the probative value.

State v. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶ 9 (2015) (evidence that makes defendant look bad may be prejudicial in eyes of jurors, but it is not necessarily unfairly so).

Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. *(Page 6.)*

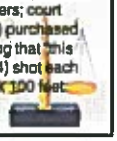
403.cr.100 Once the trial court determines a photograph has probative value, the trial court, if requested, must determine whether it has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

State v. Felix, 237 Ariz. 280, 349 P.3d 1117, ¶¶ 37–39 (Ct. App. 2015) (photographs of child's crib with bullet damage and stuffed gorilla with bullet hole in it relevant to charge of attempted murder and dangerous crime against children; trial court reviewed photographs and engaged in proper balancing analysis).

Rule 404(a) — Character Evidence Not Admissible To Prove Conduct; Exceptions: Character of Accused. *(Pages 6–7.)*

404.a.1.cr.040 A defendant may offer "observation evidence" about behavioral tendencies to show he or she possessed a character trait of acting reflexively in response to stress, but may not offer opinion whether defendant was or was not acting reflectively at time of killing.

State v. Leteve, 237 Ariz. 516, 354 P.3d 393, ¶¶ 19–24 (2015) (defendant shot and killed his two sons, age 1 and 5; because defendant's expert would have testified only that defendant had general character trait for impulsivity, and not that he acted impulsively at time of murders, trial court erred by excluding that evidence; trial court further erred in limiting defendant's parent's testimony to those events occurring night before and day of murders; court held error was harmless because evidence showed defendant (1) purchased weapon day wife filed for divorce, (2) sent messages to wife saying that "this will end badly," (3) sent letter that both he and child had signed, (4) shot each child in back of head through pillow or blanket, and (5) had to walk 100 feet after he shot one child in order to shoot other child).



Rule 404(b) — Other crimes, wrongs, or acts. *(Page 7.)*

404.b.cr.090 Extrinsic evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show the defendant's criminal character.

State v. Comman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective's statement that they had "buys" by confidential informant; court held this was not admitted to show defendant's propensities to act in certain was and thus was not Rule 404(b) material).

Rule 404(b) — Other crimes, wrongs, or acts. *(Pages 7–8.)*

404.b.cr.230 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **intent**, but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.

404.b.cr.250 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.

State v. Leteve, 237 Ariz. 516, 354 P.3d 393, ¶¶ 11–17 (2015) (after defendant's wife had filed for divorce, defendant shot and killed their two sons, age 1 and 5; court held following evidence was admissible to show defendant's intent: defendant's (1) telling his wife about his extramarital affairs, (2) calling police in attempt to have wife removed from house, (3) threats to find where wife was living, (4) attempts to create problems where wife was working, (5) sending to wife's boyfriend sexually explicit video defendant and wife had made during marriage, (6) obtaining background checks on wife's boyfriend and boyfriend's ex-wife, and (7) substantial debt and little or no money; court rejected defendant's argument that these acts against wife should not have been admitted because she was not murder victim).

Rule 702(a) — Testimony by Expert Witnesses — Assist trier of fact. *(Page 14.)*

702.a.020 When a matter is of such common knowledge that a lay person could reach as intelligent a conclusion as an expert, the trial court should preclude expert opinion.

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶ 11 (Ct. App. 2015) (court rejected defendant's contention that, in today's society, much of Dr. Wendy Dutton's testimony was common knowledge).

EXPERT WITNESSES

Rule 702(a) — Testimony by Expert Witnesses — Assist trier of fact. *(Page 14.)*

702.a.030 Merely because the expert is testifying as a "cold" witness does not mean that witness's testimony will not assist the jurors in determining a fact in issue.

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶¶ 2–8 (Ct. App. 2015) (defendant was 53 and victim was 15; defendant was victim's wrestling coach and was convicted of four sexual acts with her; Dr. Wendy Dutton testified as "cold" witness).

Rule 702(a) — Testimony by Expert Witnesses — Assist trier of fact. *(Page 6.)*

403.cr.010 A trial court may not exclude relevant evidence only if the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v. Ortiz, 238 Ariz. 329, 360 P.3d 125, ¶¶ 12–21 (Ct. App. 2015) (court concluded testimony of Dr. Wendy Dutton had probative value, and merely because she testified as "cold" witness did not mean her testimony was unfairly prejudicial).

Rule 703 — Bases of an Expert's Opinion Testimony. *(Page 15.)*

703.095 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.

State v. Guarino, 238 Ariz. 437, 362 P.3d 484, ¶¶ 33–35 (2015) (state's gang experts were permitted to base opinions on information from debriefings, free talks, wire taps, and letter interceptions from gang members, and learned in undercover capacity from gang members).

BASIS OF AN EXPERT'S OPINION TESTIMONY

Rule 704 — Opinion on an Ultimate Issue. *(Page 16.)*

704.010 Opinion evidence is admissible even if it involves an ultimate issue in the case.

State v. Williamson, 236 Ariz. 550, 343 P.3d 1, ¶¶ 27–31 (Ct. App. 2015) (officer's testimony that, in sting operation, they are trained to tell person that person has opportunity to walk away because "we try to get away from the entrapment issue" was not opinion on ultimate issue of defendant's guilt).

Rule 801 — Definitions That Apply to This Article; Exclusions from Hearsay. *(Page 17.)*

801.010 Admission of an out-of-court statement that is non-hearsay is not "testimonial evidence" and does not violate the confrontation clause of the United States Constitution.

State v. Comman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective's statement that they had "buys" by confidential informant; court held this was admitted for context and not for truth of matter asserted, thus no Confrontation Clause violation).

Rule 801(c) — Definitions That Apply to This Article — Hearsay. *(Page 17.)*

801.c.020 If the evidence is an out-of-court assertion that is not offered to prove the truth of the matter asserted, it is not hearsay and does not violate the right of confrontation.

State v. Comman, 237 Ariz. 350, 351 P.3d 357, ¶ 15 (Ct. App. 2015) (defendant contended trial court should have redacted from police station interview detective's statement that they had "buys" by confidential informant; court held this was admitted for context and not for truth of matter asserted, thus not hearsay and no Confrontation Clause violation).

Rule 801(d)(1)(A) — Statements That Are Not Hearsay: A declarant-witness's prior statement. *(Page 18.)*

801.d.1.A.090 In determining under Rule 403 whether to admit a prior inconsistent statement, the trial court should consider, *inter alia* the following *Allred* factors: (1) whether the witness being impeached admits or denies making impeaching statement and whether the witness being impeached is subject to any factors affecting reliability, such as age or mental capacity; (2) whether the witness presenting the impeaching statement has an interest in the proceedings and whether there is any other evidence showing the witness made the impeaching statement; (3) whether the witness presenting impeaching statement is subject to any other factors affecting reliability, such as age or mental capacity; (4) whether the true purpose of the statement is to impeach witness or to serve as substantive evidence; and (5) whether there is any evidence of guilt other than the statement.

State v. Williams, 236 Ariz. 600, 343 P.3d 470, ¶¶ 14–19 (Ct. App. 2015) (because state presented no other evidence to prove defendant's use of marijuana other than evidence admitted for impeachment purposes only that defendant had THC in blood, trial court vacated defendant's conviction for use of marijuana).

Rule 801(d)(2)(A) — Statements That Are Not Hearsay: An opposing party's statement.
(Page 18.)

801.d.2.A.060 The *corpus delicti* doctrine ensures a defendant's conviction is not based upon an uncorroborated confession or incriminating statement, thus the state must show (1) a certain result has been produced, and (2) the result was caused by criminal action rather than by accident or some other non-criminal action; only a reasonable inference of the *corpus delicti* need exist before the jurors may consider an incriminating statement, and circumstantial evidence may support such an inference; furthermore, the state need not present evidence supporting the inference of *corpus delicti* before it submits the defendant's statement as long as the state ultimately submits adequate proof of the corpus delicti before it rests.

Rule 801(d)(2)(A) — Statements That Are Not Hearsay: An opposing party's statement.
(Page 18.)

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 8–14 (2015) (defendant gave television interview wherein he admitted kidnapping (and killing) two victims; blood and DNA evidence linked to victim #1 was found in back seat and trunk of defendant's car; her purse was found in her trailer, and testimony indicated she would have taken purse if she left voluntarily; court held this supported inference that defendant kidnapped victim #1; DNA evidence linked to victim #2 was found in passenger compartment of defendant's car, and victim #1 and victim #2 lived together and disappeared at same time, and remains of both victims were disposed of in same manner and found in same place; court held this supported inference that defendant kidnapped victim #2).

Rule 801(d)(2)(A) — Statements That Are Not Hearsay: An opposing party's statement.
(Page 18.)

State v. Maciel, 238 Ariz. 200, 358 P.3d 621, ¶¶ 27–30 (Ct. App. 2015) (person observed defendant seated next to vacant building with broken window; when officer arrived, defendant denied any knowledge of removal of board from window; defendant later said he had removed board day before and entered building to look for money; court noted following: (1) person from building next door told officers board had been in place over window 3 days earlier; (2) force would have had to have been used to remove board; (3) shoe prints were inside building, and although they did not match shoes defendant was wearing, defendant could have been wearing different shoes day before; (4) building was used primarily for storage and window led to storage area; and (5) maintenance man who walked property twice weekly had not reported seeing anything "out of place" before incident; court held this was sufficient circumstantial evidence to show burglary had been committed and corroborated defendant's statements).

Rule 801(d)(2)(A) — Statements That Are Not Hearsay: An opposing party's statement. *(Page 19.)*

801.d.2.A.061 Whether the state has produced sufficient evidence to establish *corpus delicti* apart from the defendant's statement is a legal analysis for the trial court, thus if the state fails to produce sufficient evidence to establish *corpus delicti* apart from the defendant's statement, the trial court should grant a motion for judgment of acquittal, but if the trial court determines the state has produced sufficient evidence to establish *corpus delicti*, the jurors may consider all the evidence and there is no need to instruct the jurors on corroboration.

State v. Comman, 237 Ariz. 350, 351 P.3d 357, ¶¶ 16–20 (Ct. App. 2015) (because trial court determined state had established *corpus delicti*, trial court did not abuse discretion in denying defendant's requested jury instruction on corroboration).

Rule 801(d)(2)(A) — Statements That Are Not Hearsay: An opposing party's statement. *(Page 19.)*

801.d.2.A.064 The Arizona Supreme Court has never adopted the "trustworthiness" doctrine for *corpus delicti*.

State v. Carlson, 237 Ariz. 381, 351 P.3d 1079, ¶¶ 10, 15 (2015) (court held evidence was sufficient under either *corpus delicti* or trustworthiness corroboration rule).

Rule 803(18) —Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness—Statements in Learned Treatises, Periodicals, or Pamphlets. *(Page 19.)*

803.18.020 This rule requires that the treatise, periodical, or pamphlet be established as a reliable authority; there is no requirement that the individual articles be established as a reliable authority.

State v. West, 238 Ariz. 482, 362 P.3d 1049, ¶ 70 (Ct. App. 2015) (court rejected defendant's contention that individual articles within journals be verified as reliable).

Rule 807 — Residual Exception. *(Page 19.)*

807.050 Self-serving statements, such as claims of innocence, lack circumstantial guarantees of trustworthiness.

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (after defendant was arrested for leaving the scene of an accident, he said he was not the one who had been driving the car; court held this statement lacked trustworthiness and thus was not admissible).

RESIDUAL EXCEPTION

DUI
and
TRAFFIC LAWS

REASONABLE SUSPICION TO STOP

28–622 Failure to comply with police officer.
(Page 13.)

.020 This statute gives a person of ordinary intelligence the opportunity to know what is prohibited and provides standards for those who apply the statute, thus the statute does not violate the Due Process Clause of the Fourteenth Amendment.

State v. Burke, 238 Ariz. 322, 360 P.3d 118, ¶¶ 11–17 (Ct. App. 2015) (after defendant allegedly failed to stop at stop sign, police officer pulled him over, asked him for his license and registration, and directed him not to move his vehicle; defendant disobeyed instructions, drove his vehicle to side of roadway, called 911, and eventually exited his vehicle after additional officers arrived on scene, at which point they arrested him).

REASONABLE SUSPICION TO STOP

28–754 Turning movements and required signals. (*Page 13.*)

.030 A police officer's vehicle may constitute "other traffic" under this section.

State v. Salcido, 238 Ariz. 461, 362 P.3d 508, ¶¶ 6–13 (Ct. App. 2015) (officer's vehicle was only other vehicle affected by defendant's driving).

TRAFFIC VIOLATIONS

28–1321(A) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Implied consent to submit to test. (*Page 13.*)

.020 Telling a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance," without more, makes any subsequent consent involuntary.

State v. Valenzuela, 2016WL1637656, ¶ 2 (Ariz. Sup. Ct. 5/26/2016) (after defendant was arrested, officer read him Admin Per Se/Implied Consent Affidavit; told driver four times he was required to take test; defendant agreed to BAC test; results showed BAC of 0.223 and 0.241).

¶ 11: Whether consent is voluntary is a factual issue resolved by reviewing the totality of the circumstances based on a preponderance of the evidence.

¶ 18 "[C]onsent concevably could be voluntary if, after an officer asserts lawful authority to search, the officer retracts that assertion or an attorney advises that the search is not lawfully required before the subject of the search consents."

28–1321(A) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Implied consent to submit to test. (*Page 13.*)

.020 Telling a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance," without more, makes any subsequent consent involuntary.

State v. Valenzuela, 2016WL1637656, ¶ 2 (Ariz. Sup. Ct. 6/26/2016) (after defendant was arrested, officer read him Admin Per Se/Implied Consent Affidavit; told driver four times he was required to take test; defendant agreed to BAC test; results showed BAC of 0.223 and 0.241).

¶ 31 Good-faith exception applies ***IF RAISED AT THE SUPPRESSION HEARING.*** *Davis v. United States*, 564 U.S.229 (2011).
Brown v. McClennen, 2016WL1637664 (Ariz. Sup. Ct. 6/26/2016).
¶ 16 Good-faith exception ***DOES NOT APPLY IF NOT RAISED AT THE SUPPRESSION HEARING.***

28–1321(A) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Implied consent to submit to test. (*Page 13.*)

What is an officer to do? *Valenzuela* at ¶ 29:

1. After making arrest, ASK driver if he/she is willing to take test and advise of penalties:
   BAC ≥ 0.08 = loss of license for 90 days;
   reinstatement only after alcohol screening.
2. If agreement, need do nothing more.
3. If refusal, advise of penalties: Loss of license for 12 months or 24 months (2nd offense).
4. Ask again if driver is willing to take test.
5. If refusal, get a warrant.

28–1321(A) Implied consent to blood, breath or urine test; suspension of license upon refusal; hearing; review of suspension order—Implied consent to submit to test. (*Page 13.*)

State v. Okken, 238 Ariz. 566, 364 P.3d 485, ¶¶ 10–24 (Ct. App. 2015) (after defendant was arrested, officer read him Admin Per Se/Implied Consent Affidavit; defendant agreed to provide breath and blood samples; test results showed BAC result of 0.225).

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance. (*Page 15.*)

.010 In order to allow the results of testing of a portion of a blood, urine, or other sample taken under this section, the state must show (1) the officer had probable cause to believe the person has violated the DUI statute, (2) the sample was taken for medical purposes, and (3) exigent circumstances existed.

State v. Reyes, 238 Ariz. 575, 364 P.3d 1134, ¶¶ 5–19 (Ct. App. 2015) (in April 2012, defendant crashed vehicle into building and was taken to hospital for treatment for non-life-threatening injuries, and hospital personnel drew a sample of his blood; defendant refused to consent to officer's request for blood sample; officer did not seek warrant because he knew he could obtain portion of blood drawn by hospital personnel, but acknowledged there was sufficient time to have requested warrant; defendant conceded officer had probable cause to believe he had violated DUI statute and sample was taken for medical purposes; trial court stated it would have suppressed evidence if blood draw had occurred after 4/14/2013 when *Missouri v. McNeely* was decided; court did not apply exclusionary rule pursuant to *Davis v. United States*, 131 S. Ct. 2419 (2011)).

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance. (*Page 15.*)

.020 Before the police are entitled to a portion of a blood, urine, or other sample taken for medical purposes, the person must have voluntarily submitted to the medical treatment.

State v. Nissley, 238 Ariz. 446, 362 P.3d 493, ¶¶ 27–38 (Ct. App. 2015) (at 5:30 p.m., defendant collided head-on into oncoming vehicle, injuring four persons in vehicle and killing pedestrian; although defendant was very hostile and combative with medical personnel, court concluded defendant did not expressly refuse medical treatment, thus trial court properly denied defendant's motion to suppress results of testing on blood drawn in hospital).

28–1388(E) BLOOD TESTS

ARIZONA MEDICAL MARIJUANA ACT

ARIZONA MEDICAL MARIJUANA ACT

DOBSON V. MCCLENNEN, 238 Ariz. 389, 361 P.3d 374 (2015).
DARRAH V. MCCLENNEN, 236 Ariz. 185, 337 P.3d 550 (Ct. App. 2014), *vac'd*, 2015WL7759889 (12/01/15).

28–1381(A)(3) Driving or actual physical control—Drugs in person's body. (*Page 14.*)

28–1381(D) Driving or actual physical control—Affirmative defense. (*Page 14.*)

36–2802(D) Arizona Medical Marijuana Act—Control of vehicle. (*Pages 15–16.*)

.050 In order to prove a defendant guilty under § 28–1381(A)(3), the state must only prove the presence of a drug or metabolite in the person's body and does not have to prove the person was in fact impaired, thus the provision of the AMMA, A.R.S. § 36–2802(D), which provides immunity to being "under the influence of marijuana," does not immunize a medical marijuana cardholder from prosecution under § 28–1381(A)(3), but instead affords an affirmative defense if the cardholder shows the marijuana or its metabolite was in a concentration insufficient to cause impairment.

Dobson at ¶¶ 10–20 (blood tests showed each defendant had marijuana and its impairing metabolite in their body).

Darrah at ¶¶ 1–7 (defendant's blood contained 4.0 ng/ml of THC).

DOBSON V. MCCLENNEN, 238 Ariz. 389, 361 P.3d 374 (2015).
DARRAH V. MCCLENNEN, 236 Ariz. 185, 337 P.3d 550 (Ct. App. 2014), *vac'd*, 2015WL7759889 (12/01/15).

28–1381(A)(3) Driving or actual physical control—Drugs in person's body. (*Page 14.*)

28–1381(D) Driving or actual physical control—Affirmative defense. (*Page 14.*)

36–2802(D) Arizona Medical Marijuana Act—Control of vehicle. (*Pages 15–16.*)

.070 A.R.S. § 28–1381(D) provides a person is not guilty of violating A.R.S. § 28–1381(A)(3) if the person is using a drug as prescribed by a medical practitioner; because under federal law marijuana may not be dispensed under a prescription, a "written certification" signed by a physician pursuant to the AMMA is not a prescription under A.R.S. § 28–1381(D) and thus is not defense to a charge under § 28–1381(A)(3).

Dobson at ¶¶ 18, 22 (court held any error by trial court in excluding evidence of defendants' medical marijuana cards was harmless in light of stipulation by defendants that they had marijuana in their bodies).

28–1381(A)(3) Driving or actual physical control—Drugs in the person's body. (*Page 14.*)

.080 The "metabolite" referenced in this section is limited to any metabolite that is capable of causing impairment, which includes Hydroxy-THC, but not Carboxy-THC.

State v. Werderman, 237 Ariz. 342, 350 P.3d 846, ¶¶ 4–11 (Ct. App. 2015) (court concluded *State ex rel. Montgomery v. Harris (Shilgevorkyan)* did not overrule previously binding case law and thus did not entitle defendant to relief under Rule 32.1(g)).

ARIZONA MEDICAL MARIJUANA ACT 36–2801(1)(b) Allowable amount—Designated caregiver. (*Page 15.*)

.010 With respect to a designated caregiver, the "allowable amount of marijuana" for each patient assisted by the designated caregiver means 2½ ounces of usable marijuana.

State v. Liwski (Gillie), 238 Ariz. 184, 358 P.3d 605, ¶¶ 6–10 (Ct. App. 2015) (because defendant was authorized to care for only one patient, he was entitled to possess only 2½ ounces of marijuana, thus he did not have immunity for possession 3½ ounces of marijuana).

ARIZONA MEDICAL MARIJUANA ACT
36–2804.03(C) Registry identification cards. (*Page 16.*)

.010 This statute provided that a person with a registry identification card issued by another state that allows a "visiting qualifying patient" the right to possess or use marijuana for medical purposes in that state is allowed to possess or use marijuana for medical purposes in Arizona; because the language in the statute includes only a "visiting qualifying patient" and not a "visiting designated caregiver," a registry identification card issued by another state for a designated caregiver does not give the person the right to possess or use marijuana in Arizona.

State v. Abdi, 236 Ariz. 609, 343 P.3d 921, ¶¶ 7–13 (Ct. App. 2015) (defendant was arrested with 5.07 grams of marijuana and was charged with possession of marijuana; defendant had valid registration card issued by Oregon Health Authority as caregiver and listed her father (Oregon resident) as patient; defendant contended this permitted her to possess marijuana in Arizona; court held trial court properly precluded evidence of defendant's registration card and fact she was registered with Oregon Health Authority).

ARIZONA MEDICAL MARIJUANA ACT
36–2811(B) Presumption of medical use; protections; civil penalty. (*Page 16.*)

.010 This statute does not provide immunity from prosecution for a registered qualifying patient who provides marijuana to another registered qualifying patient in return for something of value.

State v. Matlock, 237 Ariz. 331, 350 P.3d 835, ¶¶ 7–22 (Ct. App. 2015) (in online posting, defendant offered to provide marijuana plants to other medical marijuana cardholders and requested "$25 donation" per plant; undercover officer showed defendant medical marijuana card indicating he was authorized to cultivate marijuana; defendant gave officer three marijuana plants, and officer gave defendant $75; trial court granted defendant's motion to dismiss indictment; court reversed trial court).

ARIZONA MEDICAL MARIJUANA ACT

The fundamental issue presented in this appeal is whether the AMMA bars the State from prosecuting a physician for allegedly misrepresenting (negligently or otherwise) he had reviewed the last 12 months of a patient's medical records from other treating physicians when certifying that "in [his] professional opinion the patient [was] likely to receive therapeutic or palliative benefit from the medical use of marijuana." *See* Ariz. Rev. Stat. ("A.R.S.") section 36–2801(18) (2014). We hold it does.

State v. Gear, 236 Ariz. 289, 339 P.3d 1034, ¶ 2 (Ct. App. 2014), *review granted*, CR–14–0408–PR (Dec. 1, 2015)

EVIDENCE
DUI
and
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THE END